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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 66

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR CASE-SWAYNE CO., INC.

Introductory

The only question presented by the writ of certiorari is whether Sunkist is a duly organized cooperative [1] notwithstanding that approximately 15% of its members are not producers of agricultural products, not cooperatives but profit-making corporations. Petitioner premised this question on the Capper-Volstead stipulation providing as to Sunkist's citrus packing-house members denominated "Agency Associations" that: "The agency association is *normally a private corporation.*" "Agency associations do not qualify as . . . cooperative associations under Section 1

[1] As used in this brief the word "cooperative" refers to an association duly organized under Section 1 of the Capper-Volstead Act.

of the Capper-Volstead Act." They are not fruit growers. They purchase the fruit they market through Sunkist from growers. "A contract between such an agency association and its growers which may be deemed as typical of such associations is attached hereto [the Capper-Volstead stipulation] as Exhibit 'B'." *"Agency associations constitute 14.91% by number, and 12.94% by volume of all associations in the Sunkist system."* (Our emphasis) R. 35-36 (para. 4, Agency Associations) (R. 41.)

Reply to Sunkist's Contention that Membership in Sunkist has no Legal or Economic Significance

(This contention is promiscuous throughout Sunkist's Brief. See for example pages 3, 15, 41, 46, 47, 48, 49, 55.)

I

The "non-growers" membership in Sunkist has more significance than the mere fact these members "have been issued membership certificates" (Sunkist Argument, p. 55).

The membership provisions of Sunkist make no distinction between packing houses that are cooperatives and the agency associations (a non-grower and "normally a private corporation"). (R. 35) As is pointed out, p. 6, Petitioner's Brief, Sunkist's Amended Articles of Incorporation and By-Laws refers to *all* Sunkist's packing-house members collectively as "local associations" (Article 2.2, R. 131). Even though the so-called "agency associations" (the ones we are here concerned with) are *not* fruit growers, *not* cooperatives but "is normally a private corporation" (R. 35).

In short *all* the packing-house members (whether composed of growers or non-growers) are *treated alike.*

The packing houses comprise Sunkist's most important class of membership. The District Exchange membership (Sunkist's only other membership class) is *representative*

only. It represents the packing houses affiliated with it. (Article 2.2, R. 131) As is provided in the Capper-Volstead stipulation:

> "Each District Exchange is organized and operated to meet the peculiar local needs of its member packing-house associations.
>
> * * * * * * *
>
> "Apart from its specialized marketing function, the District Exchange *is one of the conduits of communication and representation between the local packing house association and* Sunkist." (R. 42-43) (Our emphasis)

It would hardly seem to need mentioning that the members of an association (corporate or otherwise) *control* the association—its management—its business conduct (*as to whether such conduct shall be predatory or benevolent*).

Only the packing-house members have "property rights and interests" in Sunkist. (Subdivision 2 of Article Eight, "Property Rights", R. 126-127). They (the packing houses) exercise *exclusively* all membership voting privileges (except the election of directors *which they control* indirectly through the District Exchanges with which they are affiliated). (Articles 3.1; 3.3, R. 133, 135). The number of votes of the packing houses is determined by the volume of fruit they market through Sunkist (Subdiv. 1, Article Eight, "Voting Power", R. 126; Article 1.2(g), R. 129; Article 3.1, R. 133). Such exclusive packing-house voting privilege includes "varietal voting" relating to "promotion of a particular variety of fruit and the assessment relating thereto" (Article 3.2, R. 134). The number of directors also is related to the volume of fruit marketed by the packing houses in their District Exchange (Articles 5.1, 5.2, R. 137-138).

Membership of approximately 15% (comprising approximately 13% of Sunkist's volume) is hardly "negligible" (Sunkist's Brief, p. 41) or *de-minimus* (a trifle—a few dollars more or less [2]). For example, 12.94% of the dollar value of *oranges alone* controlled by Sunkist in the year 1957-58 amounts to *over $15 million* and the same percent of Sunkist's total sales for that year amounts to over $23 million.[3]

Thus, Sunkist, by admitting these non-growers to membership, very appreciably strengthened its monopoly control of oranges in the relevant market and its power to wrongfully exercise monopoly power and attempt to monopolize in violation of the Sherman Act.

II

The outstanding legal and economic significance in providing that a cooperative's members must be *"farmers"* is that Section 1 of the Capper-Volstead Act permits members to act together in a cooperative and fix the prices of their products, *which price fixing would otherwise constitute a per se violation of the antitrust laws.* That is why Congress exercised such care in choosing the language of Section 1 so that only actual farmers may constitute a cooperative's membership, *not* the *middleman,* such as flour mills, packers, packing houses—*for if 15% of a coopera-*

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[2] See *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 607 (1939); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. 2d 198, 201 (9th Cir. 1939); *Fallbrook Public Utility Dist.* v. *Cowan,* 131 F. 2d 513, 516 (9th Cir. 1942), *cert. denied,* 320 U.S. 735 (1943); *McKeown* v. *Southern California Freight Forwarders,* 52 F. Supp. 331 (S.D. Cal. 1943), aff'd 148 F. 2d 890, *cert. denied,* 326 U.S. 736 (1945); *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 94 (1962).

[3] Computed from figures on p. 17, "Petition For A Writ of Certiorari", No. 1157, October Term, 1966.

tive's members may be non-growers; why not 50%-100%? See discussion following.

Reply to Sunkist's Contention that Congress Intended that "Non-Farmers" could be members of Cooperatives

(Sunkist's Brief, pp. 44, 45, 35)

I

Congress was most cautious, most careful in employing language that would permit *only* "persons engaged in the production of agricultural products *as farmers* . . . or *fruit growers,*" to comprise a cooperative's membership. This is illustrated by the colloquy between Senators Cummins, Kellogg and Townsend quoted at pages 9-10, Petitioner's Brief. Congress deliberately chose language that would preclude *the middleman,* such as "flouring mills" and "packers" who "are engaged, in a broad sense, in the production of an agricultural product" from cooperative membership. (62 Cong. Rec. 2052). *If* (as Sunkist contends) such "non-growers" may act together in cooperatives, then *flouring mills* and *packers* of fruits and vegetables (although "normally private corporations") may "act together in associations" and fix the prices of *their* products. Then *packing houses* (although "normally private corporations") may "act together in associations" and fix *their* prices for picking, washing, grading and packing citrus fruit whether under a fruit purchase agreement or otherwise.

A holding by this court that such "non-growers" may fix prices by the device of a cooperative would open wide the door to price fixing to a huge segment of our economy.

In defending the membership of the so-called "agency associations" in the Sunkist association, Sunkist argues at great length that Exh. B to the Capper-Volstead stipulation (the typical contract under which the packing houses acquire their fruit from growers) is not a sale of fruit by the grower to the packing house although the contract specifically provides for the "sale . . . of the citrus fruit by the grower." And that the net proceeds are "the full purchase price for the fruit." (R. 70, 71) In support of this contention, Sunkist quotes and requotes it (pp. 11, 12, 40, 53) the preamble to that portion of the Capper-Volstead stipulation providing that Exh. B is the typical agreement between these Sunkist members and the growers. We quote the *preamble* together with the stipulation re. Exh. B.

> "The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist *beyond the recovery of its costs and fixed fee for packing.* Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled. *A contract between such an Agency Association and its growers which may be deemed as typical of such Associations is attached* hereto as Exhibit 'B'." (R. 36) (Our emphasis)

The preamble is but one way of saying that these packing-house members will not "gamble" on price fluctuations of fruit but *assure* their *profits.*

It is idle to argue as to just when title to the fruit passes from the grower. Title obviously passes at *some point.* The relevant, pertinent fact is *only*: These Sunkist members are *not* "engaged in the production of agricultural products as farmers . . . or fruit growers" and therefore do *not* "market" through Sunkist "such products of per-

sons so engaged." They acquire the fruit they market through Sunkist by a contract, of which "Exhibit B" to the Capper-Volstead stipulation is "typical."

Sunkist also argues that a cooperative could legally enter into such a contract (Exh. B) with packing houses. *Such argument is entirely beside the point.* A cooperative obviously may be entitled to enter into many types of contracts with various types of non-growers *Packers, packing houses,* "the butcher, the baker, the candlestick maker." The *only* issue the writ of certiorari is concerned with is: *Who may comprise the membership of a cooperative—not* who may a cooperative contract with.

Reply to Sunkist's Contention that the Issue Presented by the Writ of Certiorari was Determined in Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962).

(See Sunkist's brief, pp. 36, 37, 48, 52, 53, 55).

I

On pp. 14-19, Petitioner's Brief we challenge the correctness of the majority decision of the Court of Appeals that the Capper-Volstead issue was decided by this court in the *Winckler* case. (Sunkist appears now to admit that its representations in the *Winckler* case that *all* the packing houses were "local associations" (Petitioner's Brief, pp. 18-19) was *incorrect* (Sunkist's Brief, p. 25).) Thus, we discuss only Sunkist's attempt to draw an analogy between what this court held of "*de-minimus*" effect in the *Winckler* case and the issue presented by the writ in this case.

The organizational distinctions that the Supreme Court in the *Winckler* case held of "*de-minimus* meaning and effect" to growers were these: The growers "through"

the same grower "local associations" organized *two* associations, i.e., Sunkist and Exchange Lemon[4] to do their processing and marketing. When they could have organized "*one* organization" (Court's emphasis) to perform these functions (370 U.S. at pp. 27-29). *Winckler* had *conceded that Sunkist Exchange Orange and Exchange Lemon were duly organized* under Section 1 of the Capper-Volstead Act. Thus, as stated by the dissenting judge of the Court of Appeals:

> "The *particular issue* [the issue presented by the writ herein] *was not presented to the Supreme Court, and it was not adjudicated.*" (R. 185) (Our emphasis)

The Legislative History of such Acts as the Agricultural Marketing Act (7 U.S.C. 451, et seq.), the Sherman Act, the Farmer-Labor Exemption In Appropriation Acts and the story of the California Associated Raisin Company (Sunkist's Brief, pp. 16-19, 23-25) are Irrelevant and Illusive as to Congress' Intent as to What Persons could qualify for Membership in Cooperatives under Section 1 of the Capper-Volstead Act.

I

On pages 9-14, Petitioner's Brief, we quote from the legislative history of the Capper-Volstead Act. We submit that this history conclusively demonstrates it was the intent of Congress that under the provisions of Section 1: *Only* actual "*farmers*" or "*growers*" should comprise a cooperative's membership.

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[4] Exchange Orange was a 100% owned subsidiary of Sunkist.

We submit: The provisions of Section 1 of the Capper-Volstead Act relied upon by Petitioner mean what they say. And (as was the opinion of the dissenting judge of the Court of Appeals) apply to *all* associations—even Sunkist.

Respectfully submitted,

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W. GLENN HARMON,
by William H. Henderson.

J. EDWARD JOHNSON,
RICHARD A. PERKINS.